

**United States Department of Labor
Employees' Compensation Appeals Board**

M.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Indianapolis, IN, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 17-1462
Issued: January 23, 2018**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 20, 2017 appellant, through counsel, filed a timely appeal from a May 11, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that her October 2, 2003 loss of wage-earning capacity (LWEC) determination should be modified.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 10, 2001 appellant, then a 44-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that on February 9, 2001 she experienced pain in both shoulders as a result of repeated motion, lifting, and sweeping at work; OWCP File No. xxxxxx739. She did not stop work, but worked limited duty beginning February 10, 2001. OWCP accepted appellant's claim for bilateral shoulder sprain and right shoulder impingement.

Appellant filed an occupational disease claim (Form CA-2) on February 11, 2001 alleging that she developed swollen wrists due to the repetitive duties of her federal employment as a mail processor. OWCP accepted her claim for right and left wrist edema.³

On December 18, 2001 OWCP administratively combined the current case file, OWCP File No. xxxxxx739, and OWCP File No. xxxxxx329, with the current case serving as the master file.⁴

In a January 8, 2003 patient status report, Dr. J. Paul Kern, Board-certified in physical medicine and rehabilitation, noted appellant's complaints of pain and limited mobility of her shoulders. He diagnosed bilateral shoulder pain. Dr. Kern indicated that appellant could work modified duty with restrictions of no working overhead (above shoulder), no lifting over five pounds, no repetitive hand/arm movement, and no repetitive lifting, twisting, or bending.

Appellant accepted a limited-duty position as a modified distribution clerk on May 27, 2003. The duties of the position were to conduct daily safety and security audits in all pay locations, provide daily mail counts, and standing, holding a clipboard to complete checklist on preprinted forms. It also noted that other duties may be assigned that were within appellant's medical restrictions. The physical requirements consisted of no repetitive lifting over five pounds, no repetitive bending and twisting, no working overhead, and no repetitive hand/arm movement. The job offer indicated that appellant's position was available effective June 14, 2003 and would be available as long as the job-related disability existed. It noted that the work schedule was from 11:00 p.m. to 7:00 a.m. with nonscheduled days of Tuesday and Wednesday.

By decision dated October 2, 2003, OWCP reduced appellant's compensation to zero based on its finding that her actual earnings as a modified distribution clerk, effective June 14, 2003, fairly and reasonably represented her wage-earning capacity.

On March 19, 2009 appellant filed a claim for compensation for wage loss (Form CA-7) beginning March 8, 2009. In the time analysis form (Form CA-7a), she reported that she was taken off the clock by her supervisor and that no work was available.

In a letter dated March 30, 2009, OWCP informed appellant that her claim for wage-loss compensation was being treated as a request for modification of her previous October 2, 2003

³ OWCP File No. xxxxxx329.

⁴ On February 5, 2003 appellant filed a claim for a schedule award (Form CA-7). In a May 27, 2003 decision, OWCP granted her a schedule award for four percent permanent impairment of the right upper extremity. The award ran for 12.48 weeks from November 21, 2002 to February 16, 2003.

LWEC determination. It advised her that her previous LWEC determination may only be modified if one of the following criteria had been met: the original rating was in error, the claimant's medical condition had changed, or the claimant had been vocationally rehabilitated. OWCP requested that appellant provide evidence which proved that one of the criteria had been met. Appellant was afforded 30 days to submit the additional information. No additional evidence was received into the record.

By decision dated May 19, 2009, OWCP denied appellant's claim for wage-loss compensation beginning March 8, 2009. It determined that she did not submit any evidence to establish that the original October 2, 2003 LWEC determination should be modified.

Appellant continued to file several claims for wage-loss compensation (Form CA-7) for ongoing disability. On CA-7a forms she submitted, appellant reported that there was no work available.

OWCP issued a series of letters dated June 23, 2009 through April 1, 2010, which explained that because appellant was requesting a continuation of wage loss beginning March 8, 2009, her claims were included in the May 19, 2009 OWCP decision which denied her claim for wage-loss compensation. It advised appellant to refer to the May 19, 2009 decision for her appeal rights if she disagreed with the decision.

On March 30, 2016 appellant, through counsel, requested reconsideration of the May 19, 2009 decision. Counsel asserted that the original October 2, 2003 LWEC determination was erroneous because the position upon which it was based was make-shift in nature. He alleged that the duties of appellant's "modified distribution clerk" position were so strict and had been designed to meet her particular needs and limitations. Counsel cited to *Janice Geiger*⁵ and *A.J.*⁶ as similar cases where the Board found that a limited-duty position that did not require any casing of mail or lifting more than five pounds was an adaptation for the employee's particular needs, rather than an accurate reflection of the requirements for a "clerk" position. He also asserted that appellant's modified clerk position was temporary in nature since the employing establishment terminated her limited-duty assignment on March 8, 2009. Counsel further contended that appellant's position was not productive and that OWCP should have differentiated that appellant was in a classified position before her accepted injury. Lastly, he contended that OWCP did not properly follow FECA procedure as detailed in FECA Bulletin No. 09-05 to determine whether a modification of an LWEC determination was appropriate when a position is withdrawn pursuant to the National Reassessment Program (NRP). Counsel concluded that the original October 2, 2003 LWEC determination was erroneous and should be modified.

By letter dated June 8, 2016, OWCP requested that the employing establishment address whether the position on which it based its LWEC determination was a *bona fide* position. It further asked that the employing establishment submit any relevant medical evidence in its possession in addition to a formal job description of appellant's position.

⁵ Docket No. 00-0821 (issued August 17, 2001).

⁶ Docket No. 10-0619 (issued June 29, 2010).

The employing establishment responded to OWCP's request in a June 8, 2016 letter. It related that appellant had not worked since March 8, 2009 so it was unable to address what position or duties she had been performing. The employing establishment reported that it did create a permanent rehabilitation assignment specifically for her effective June 14, 2003 therefore it was not a temporary limited-duty job. It explained that when creating a permanent position, it intended for the position to be a "*bona fide*" job, but the position could be modified in order to meet the needs of the service. The employing establishment submitted various Notification of Personnel Action forms (SF-50) dated November 18, 2000 to November 15, 2014.

By decision dated May 11, 2017, OWCP denied modification of its October 2, 2003 LWEC determination. It also found that appellant was not entitled to wage-loss compensation beginning March 8, 2009. OWCP determined that the medical evidence of record was insufficient to establish that her medical condition had materially changed to the point that she could no longer perform the modified-duty position upon which the October 2, 2003 LWEC determination had been based. It further determined that the modified job position, effective June 14, 2003, was a *bona fide* job or position.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.⁷ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁸

OWCP procedures contain provisions regarding the modification of a formal loss of wage-earning capacity.⁹ The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.¹⁰ The burden of proof is on the party seeking modification of a formal loss of wage-earning capacity determination to prove that one of these criteria has been met.¹¹

OWCP procedures further provide that factors to be considered in determining if a position fairly and reasonably represents the injured employee's wage-earning capacity include: (1) whether the kind of appointment and tour of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part-time (unless the employee was a part-time worker at the time of injury) or sporadic in nature; (3) whether the job is seasonal in an area where year-round

⁷ 5 U.S.C. § 8115(a); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁸ See *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

¹⁰ *Id.* at Chapter 2.1501.3(a) (June 2013).

¹¹ *Id.* at Chapter 2.1501.4 (June 2013); see also *Tamra McCauley*, 51 ECAB 375, 377 (2000).

employment is available; and (4) whether the job is temporary where the claimant's previous job was permanent.¹² Additionally, a makeshift or odd-lot position designed to meet an injured employee's particular needs will not be considered representative of one's wage-earning capacity.¹³

Assuming the position is both vocationally and medically suitable and conforms to the above-noted criteria, the position will generally be deemed to represent an employee's wage-earning capacity, after he or she has successfully performed the required duties for at least 60 days.¹⁴

ANALYSIS

OWCP accepted that appellant sustained bilateral shoulder strain, right shoulder impingement, and right and left wrist edema in the performance of duty. On June 14, 2003 appellant returned to work as a full-time modified mail distribution clerk. OWCP issued an October 2, 2003 LWEC determination, based on her actual earnings in the modified distribution clerk position.

On March 8, 2009 appellant stopped work. She filed various wage-loss compensation claims for total disability and indicated that there was "no work available." Because a formal LWEC determination had been issued on October 2, 2003, OWCP treated appellant's wage-loss compensation claim as a request for modification of the original LWEC determination. In decisions dated May 19, 2009 and May 11, 2017, it denied modification of the October 2, 2003 LWEC determination, finding that the June 14, 2003 modified distribution clerk position was *bona fide*.

The Board finds that OWCP properly denied appellant's request to modify the October 2, 2003 LWEC determination.

As noted above, an LWEC determination can be modified by establishing that the original decision was in error.¹⁵ Counsel has alleged that OWCP's original October 2, 2003 LWEC determination was in error because it was based on a job position that was makeshift. The Board has long recognized that an employing establishment may accommodate an employee's work-related medical restrictions by modifying the way a job is performed, if the assigned tasks of that position are those of a regular job, available in the community or open labor market, which would have been performed by another employee.¹⁶ However, the Board

¹² *Id.* at Chapter 2.815.5c(1) (June 2013).

¹³ *Supra* note 6.

¹⁴ *Supra* note 9 at Chapter 2.815.5(e) (June 2013).

¹⁵ *Supra* note 9.

¹⁶ *L.C.*, Docket No. 13-1934 (issued September 29, 2014); *Jeffrey T. Hunter*, 52 ECAB 503 (2001).

has also held that a job created specifically for an employee composed of odd-lot tasks within an employee's medical restrictions, is makeshift.¹⁷

In the case of *A.J.*,¹⁸ the Board discussed several factors to consider for determining whether an offered position was makeshift or odd-lot in nature. These factors include: (1) whether the position lacked an official title or formal position description; (2) whether the position included strict physical limitations, such as five-pound lifting and no casing of mail, which indicated that the claimant would not be able to secure a position in the community at large with such limited duties; (3) whether the position lacked any meaningful tasks; and (4) whether the job appeared to be temporary in nature.¹⁹

The Board finds that the June 14, 2003 modified distribution clerk position upon which OWCP based the October 2, 2003 LWEC determination was not makeshift in nature. Pursuant to the criteria set forth in *A.J.*, the job of modified distribution clerk was not a makeshift or odd-lot job position. The position description had a formal title of modified distribution clerk with a set work schedule and specific duties appropriate to the position, thus meeting the first criterion. Although the job position had specific physical limitations, including no repetitive lifting over five pounds, bending and twisting, working overhead, and repetitive hand/arm movement, the Board has found that such physical restrictions are not overly strict.²⁰ Lifting restrictions as low as five pounds have not been found to preclude finding a similar position in the community-at-large.²¹ Furthermore, the modified distribution clerk position contained meaningful tasks such as conducting safety and security audits, providing daily mail counts, and completing checklists. Thus, it met the second and third criteria. Finally, the job position indicated that it was available as long as appellant's job-related disability existed. The employing establishment also verified in a July 15, 2016 letter that the June 14, 2003 modified mail clerk position was not a temporary job and fully intended to be a "*bona fide*" job. Accordingly, the fourth criterion was met. The Board finds that the evidence of record fails to establish that the June 14, 2003 modified mail clerk position was a makeshift position.

The Board further finds that appellant's modified distribution clerk position was not temporary in nature since appellant had performed the duties of the modified position for at least 60 days prior to the October 2, 2003 LWEC determination and had performed them until she stopped work on March 8, 2009. Appellant has also failed to establish that the duties of the modified distribution clerk were not productive or that the modified position was not equivalent to her date-of-injury job. The Board also notes that OWCP properly followed FECA procedure as detailed in FECA Bulletin No. 09-05 when it requested additional information from the

¹⁷ *P.G.*, Docket No. 14-1797 (issued September 16, 2015).

¹⁸ *Supra* note 6.

¹⁹ *See also V.H.*, Docket No. 13-2076 (issued March 5, 2014).

²⁰ *See D.I.*, Docket No. 16-0363 (issued June 7, 2017).

²¹ *See T.P.*, Docket No. 14-1207 (issued November 7, 2014).

employing establishment in its June 8, 2016 letter.²² Accordingly, the Board finds that appellant has failed to establish that the original October 2, 2003 LWEC determination was erroneous.

Appellant has not alleged that her medical condition has changed such that she could no longer perform the duties of her wage-earning capacity position, nor does she argue that she has been retrained or vocationally rehabilitated. The Board therefore finds that she has not established that her October 2, 2003 LWEC determination should be modified.

Appellant may request modification of the LWEC determination, supported by new evidence or argument at any time before OWCP.

CONCLUSION

The Board finds that appellant has failed to establish that her October 2, 2003 LWEC determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 23, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²² See *M.D.*, Docket No. 14-1214 (issued October 16, 2015).